SUPREME COURT, U. S.

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NO. 268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

RAYMOND BURNS,
Petitioner,

VS.

THE STATE OF NEW MEXICO,
BUREAU OF REVENUE,
INCOME TAX DIVISION
VICENTE OJINAGA, ACTING DIRECTOR,
Respondents.

AND

JAMES B. HERT,
Petitioner,

VS.

THE STATE OF NEW MEXICO,
BUREAU OF REVENUE,
INCOME TAX DIVISION
HOWARD DOWNEY, ACTING DIRECTOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Petitioners, RAYMOND BURNS and JAMES B. HERT, pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of New Mexico entered on April 8, 1968, in the consolidated cases of RAYMOND BURNS v. STATE OF NEW MEXICO, ET AL. (No. 8453) and JAMES B. HERT v. STATE OF

NEW MEXICO, ET AL. (No. 8454), which Judgment affirmed those of the District Court of Santa Fe County, New Mexico, entered therein, denying Petitioners any relief in their actions against the State of New Mexico Incoe Tax Law, and awarding the State judgment on its counterclaim against HERT for back taxes.

OPINIONS BELOW

The Supreme Court of New Mexico has issued an opinion in this case, a copy of which appears in Appendix "A" to this petition, at pages 1a-9a. The opinion has not yet been reported.

JURISDICTION

The judgment of the Supreme Court of New Mexico was entered on April 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the State of New Mexico, under the Buck Act, has the Constitutional power and legislative jurisdiction to levy an income tax on non-resident employees at White Sands Missile Range, New Mexico, an area over which the State ceded exclusive jurisdiction to the United States when no valid income tax law as to non-residents existed, or does such levy violate the exclusive legislative power of Congress under Sections 1 and 8 (Clause 17) of Article I, and Section 1 of the 14th Amendment to the United States Constitution?

2. Whether the State of New Mexico can constitutionally levy an income tax on non-resident employees of White Sands Missile Range, New Mexico, who receive no benefits or protection from the State, or does such levy violate the Privileges and Immunities Clause in Section 2 of Article IV, Section 1 of the 14th Amend-

ment to the United States Constitution and the Due Process and Equal Protection Clauses therein.

3. Whether the State of New Mexico can constitutionally require non-resident employees at White Sands Missile Range, New Mexico, to pay the same rate of state income tax as residents without regard to the minimal (or non-existent) benefits and protection they receive from the State, or does such rate bear an unfair ratio to such benefits, if any, so as to violate the Privileges and Immunities Clause in Section 2 of Article IV, Section 1 of the 14th Amendment to the United States Constitution and the Due Process and Equal Protection Clauses therein?

4. Whether the State of New Mexico can constitutionally levy the full rate of state income tax on non-resident employees at White Sands Missile Range, New Mexico, on their income earned there because of their use of a road in the State to gain access to and from such exclusive federal area, or does such tax abridge their privileges and immunities conferred by Section 2 of Article IV and the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution to use such road without being so taxed?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. UNITED STATES CONSTITUTION

ARTICLE 1, SECTION 1 of the United States Constitution provides:

> "All legislative powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives."

ARTICLE I, SECTION 8, CLAUSE 17 of the United States Constitution gives Congress the power,

> "To exercise exclusive Legislation in all Cases whatsoever, over such district (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock Yards, and other needful Buildings."

ARTICLE IV, SECTION 2 of the United States Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States"

ARTICLE IV, SECTION 3, CLAUSE 2 of the United States Constitution states:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."

Section 1 of the 14th Amendment to the Constitution of the United States reads as follows:

> "All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. NEW MEXICO LEGISLATION

Various New Mexico Statutes which are involved include the following:

1. "That *exclusive* jurisdiction be, and the same is hereby ceded to the United States over all the territories set apart from the public domain and comprised within the limits of the Fort Wingate Military Reservation, in McKinley County, and Fort Bliss Target Range, in Dona Ana County, and over such land as may hereafter be reserved from the public domain for the enlargement of said reservations; *provided, however,* that the State of New Mexico reserves the right to serve civil or criminal process within said reservations in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of such cession and reservations; and provided further, that the jurisdiction herein ceded shall continue no longer than the United States shall own and hold said reservation for military purposes." (N.M.S.A., 1953 Comp., Sec. 7-2-7) (effective February 12, 1941) (emphasis added)

2. 72-15-1. "*Purpose, Assessment and levy of tax*— There is assessed and levied a tax for the use of the State public school equalization fund, and the State government, at the rates specified in Sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation, upon the net income

   A. Of every resident individual . . .

   B. Of every foreign corporation or association and of every non-resident individual . . . having a business, agency or employment, or engaged in the transaction of business in, into or from this State, or deriving any income from any property or employment within this State, in proportion to the net income of such business, agency or employment as hereinafter provided." (1961, Ch. 150, § 1)

3. 72-15-1.1 "*Income taxes apply to persons on federal areas* — No person shall be relieved from liability for any income tax levied by this State, or by any duly authorized taxing authority herein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or work or services performed in such area, with such taxes applying in federal areas to the extent permitted by Acts of Congress."
(1957, Ch. 225, § 1)

4. Sub-section E of N.M.S.A. 72-15-21 provides:
"The tax assessed by the provisions of Sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation is imposed at the same rates upon the net income of non-resident individuals of this State insofar as and to the extent that the net income was derived from property owned or business, trade, profession or occupation carried on in this State by those individuals."
(Laws 1961, Ch. 242, § 1)

5. 72-15-6 "Definitions of 'base income' and 'net income'—

A. 'Base income' of a tax payer means that part of the taxpayer's income generally defined as Federal taxable income and upon which the federal income tax is calculated less the federal income tax payable for the taxable year.
B. The 'net income' of all tax payers shall be the 'base income' adjusted to provide that: . . . (3) Amounts included in base income that the State is prohibited from taxing because of the provisions of the Federal Constitution, the State Constitution or federal laws shall be deducted; . . ." (Laws 1961, Ch. 242, § 1)

C. FEDERAL LEGISLATION

The Buck Act, 4 U.S.C. Sections 105-110, is also in-

volved in this case, and Section 106 thereof relating to income taxes provides:

> "(a) No person shall be relieved from liability for any income tax levied by any state, or by any duly constituted tax authority therein, *having jurisdiction to levy such a tax,* by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such state or taxing authority shall have the full jurisdiction and power to levy and collect such tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area." (Emphasis added)
>
> "(b) The provisions of subsection (2) shall be applicable only with respect to income or receipts received after December 31, 1940."

STATEMENT OF THE CASE

In 1940, Congress passed the Buck Act (54 Stat. 1059-61), 4 U.S.C. § 105-110, which concerns the liability of employees of federal areas for state income tax.

White Sands Missile Range, an area in southernmost New Mexico, was originally an extension of Fort Bliss, Texas, the large military establishment adjacent to El Paso, Texas, and was ceded by the State of New Mexico, within the meaning of Article I, Section 8, Cl. 17 of the United States Constitution, to the federal government in February of 1941 (N.M.S.A., 1953 Comp., Sec. 7-2-7.). A State Income Tax law was passed by the New Mexico Legislature in 1941, "upon every resident and non-resident", (N.M.S.A. 1941, Section 76-1220). Texas does not and never has had a State Income Tax. Texas residents subjected to the New Mexico income tax laws by virtue of their employment in the enclave had contested their liability before the instant actions were

brought. In the early 1960's, a suit was filed by a Texas resident on constitutional grounds and the New Mexico Supreme Court in *State v. Ashby*, 387 P.2d 588 (N.M. 1963), declared the tax invalid because it allowed exemptions for residents but not for non-residents and was held to be discriminatory and violative of the Equal Protection Clause of the 14th Amendment to the United States Constitution. Prior to the actual decision in Ashby, the New Mexico Legislature had repealed the sections which were to held invalid, and enacted tax laws with exemptions allowed to residents and non-residents alike. (N.M.S.A., 72-15-1, 72-15-21E, and 72-15-6). (1961) It is this later enactment which is the subject of attack by Petitioners in the instant cases.

Petitioners are both residents of El Paso County, Texas, and employees of the United States Government at White Sands Missile Range, New Mexico. In 1965, they brought separate actions in the District Court of Santa Fe County, New Mexico, seeking to recover from New Mexico amounts withheld from their earnings at White Sands Missile Range subsequent to May 31, 1964, for income tax imposed by the State on the grounds that New Mexico had no Constitutional authority or legislative jurisdiction to levy or collect such tax in that such tax violated Section 1 of the 14th Amendment and Section 2 of Article IV of the United States Constitution (Burns, 4, 5, 8, 9; Hert, 11, 12). (The pleadings and judgments in both cases in the District Court are found in Appendices "B" and "C"; infra). The State opposed plaintiffs' claims in both actions and counter-claimed in the Hert action for income tax claimed to be owed for the years 1961 through 1964, plus penalty and interest (Hert, p.15). Both causes were submitted to the District Court on stipulated facts, which included the facts of employment of the plaintiffs by the federal govern-

ment at White Sands Missile Range in New Mexico; their residence in El Paso, Texas; the amounts withheld or which would be due to the State of New Mexico if the income tax law were valid; and that White Sands Missile Range is a federal area in Dona Ana and Otero Counties, New Mexico (Burns, 12-14; Hert, 22-24).

The District Court in both actions entered judgment dismissing the complaints on the merits (Burns, 29, Hert, 45), and awarded the State of New Mexico the sum of $344.56 plus penalty of $34.46 and interest on its counter-claim against Hert, representing the full rate of claimed New Mexico income tax liability for the years 1961 through 1964 (Hert, 46, 46). The Court entered findings of fact and conclusions of law, including those to the effect that the Buck Act (4 U.S.C. §§ 105-110) conferred jurisdiction upon New Mexico to levy an income tax on the income of non-resident persons employed at White Sands Missile Range, and that the cession of exclusive jurisdiction over White Sands by New Mexico to the federal government was subject to the provisions of such Act (Hert, 39-42) (Burns, 24-26), and that the State was entitled to judgment, to all of which the plaintiffs excepted and appealed to the Supreme Court of New Mexico (Burns, 28-30; Hert, 44, 47), where the cases were consolidated. The Court, relying mainly on the Buck Act, held that New Mexico had the Constitutional power and legislative jurisdiction to tax non-resident employees at White Sands and affirmed the judgments entered below. The Court's opinion is found herein as Appendix "A".

REASONS FOR GRANTING THE WRIT

1. This case concerns the Constitutional power and legislative jurisdiction of the State of New Mexico to levy the full rate of income tax on non-resident employ-

ees at White Sands Missile Range, New Mexico, an area ceded by the State to the Federal Government when no valid income tax law as to non-residents existed, and the application of the Constitutional provisions conferring exclusive legislative jurisdiction to the Congress.

The New Mexico Legislature ceded exclusive jurisdiction to the United States over the property here involved, reserving only the right to serve civil and criminal process (Ch. 8, 1941 Sess. Laws, N.M.S.A., 1953 Comp., Section 7-2-7, see page 5, supra). This Court, in *Paul v. United States*, 371 U.S. 245 (1963), reaffirmed the ancient principle that,

> "Since a state may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws", 371 U.S. 268.

Since the legislature did not pass an income tax until later in 1941 and since the Supreme Court of New Mexico had held that the State's income tax as to non-residents was invalid for failing to allow exemptions allowed to residents, *State v. Ashby*, 387 P.2d 588 (N.M. 1963), no income tax law or any valid one as to non-residents was in existence at the time of the cession in 1941. Subsequent enactments by the New Mexico Legislature, including Sections 72-15-1, 1.1 and 21E, under which Petitioners' liability has been sustained here, are not enforceable on the federal enclave because adopted long after the transfer of sovereignty, *Paul v. United States*, 371 U.S. 245 (1963); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940); *Arlington Hotel v. Fant*, 276 U.S. 439 (1929); and *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943); *Chicago, Rock Island & P. Ry. Co. v. McGlinn*,

114 U.S. 542 (1885). Cases relied on by the Courts below, including *Howard v. Commissioners*, 344 U.S. 624 (1953) and *Kiker v. Philadelphia*, 364 Pa. 624, 31 A.2d 289 (1943) cert. denied 320 U.S. 741, are believed to be distinguishable from the instant cases because the state apparently ceded the areas in question *before* passage of the Buck Act.

The decision of the Court below in the instant case is irreconcilable with its own decision in *Arledge v. Mabry*, 197 P.2d 884 (N.M. 1948), in which the New Mexico Supreme Court held not only that residents of an exclusive jurisdiction area in New Mexico could not vote, but also that votes cast at polling places on the area were invalid, as the place was "not in New Mexico". (The New Mexico Legislature later cured the inequity created by the *Arledge case*, and granted voting rights to residents of federal areas in New Mexico). If these exclusive reservations are "not in New Mexico", what is the basis for the levy of tax on incomes earned in such areas?

The Court below held that the Buck Act was self-executing and was therefore applicable in the instant case in spite of the facts that cession took place *after* the passage of the Buck Act, and that State tax legislation, if any, in effect at the time of cession with respect to non-residents was unconstitutional. The Buck Act should not be construed to confer jurisdiction to tax, but only to consent to such valid taxation as was then in existence. Congress should not be deemed to have given such broad approval or blanket authority to unbridled and continuing state taxation in federal areas without explicit and unambiguous legislative action. Even when Congress has adopted state laws in federal areas, it "has acted as definitely as if it had repeated the words" used by the state, as Mr. Justice Holmes said in dissent in

Knickerbocker Ice Co. v. Stewart, 253 U.S. 148 at 167 (1920). The extent of Congressional authorization to State taxation has been before this Court before in several cases, including *Offutt Housing Co. v. Sarpy*, 351 U.S. 259 (1956), in which the Court stated that Congress, in failing to provide explicit and unambiguous legislative enactment had left specific problems to be resolved by the judiciary. The Court, with difficulty, held that Congress had intended to permit state taxation by the general language used. Congress subsequently changed the law to limit such taxation, Act of 11 August, 1955, § 408, 69 Stat. 653, as amended, 42 U.S.C. § 1594 (note) (1958), and thereafter passed an act providing that if private leasehold interests in federal property is *later* made taxable by State or local governments, the lease *shall* be re-negotiated, 10 U.S.C. § 2667 (c) (1958). The *Offutt* case shows that when Congress fails to act with specificity, the Court can and does "guess" wrongly as to what it meant. Since Congress has used only general language here, it has not spelled out its intent to permit *continuing* state legislation, as it apparently did in Offutt, and has specifically done on occasion, as under the Assimilative Crimes Act, 18 U.S.C. § 13. More specificity should be required before holding that the Buck Act gave unlimited and continuing jurisdiction to enact income tax laws applicable to all employees in federal areas, particularly in view of the fact here that the New Mexico Supreme Court itself has held the state income tax laws unconstitutional in the case of non-residents. As Mr. Justice Douglas, with whom Mr. Justice Black concurred in dissenting in *U.S. v. Sharpnack*, 355 U.S. 286 at 290 and 291 (1958) (the Assimilative Crimes Act case) states:

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested . . . It is no answer to say

> that the citizen would have a defense . . . to unconstitutional application of these laws or the procedures under them. He is entitled to the considered judgment of Congress . . ."

It should be noted here that the federal "policy" in favor of State taxation in federal areas, as expressed by the Buck Act, is not as all inclusive as might be thought, and is perhaps discriminatory in effect in that it authorizes State taxes on income, sales and use in federal areas, but not on privately owned personal property, which is still immune, *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964); *IBM v. Vaughn*, 98 S.2d 474 (Fla. 1957).

This Court should grant the writ in these cases to decide the Constitutional efficacy of the Buck Act to recede taxing authority to the State of New Mexico over White Sands Missile Range in light of the facts of these cases and the Court's prior decisions. The proper construction of the Buck Act is to hold that it was not intended to authorize continuing or unconstitutional state taxation, and thereby avoid any construction which would render the Buck Act itself unconstitutional.

2. This case also concerns the right of Texas residents to be free from paying the full rate of income tax to the State of New Mexico, from which they have received no benefit or protection. In attacking the jurisdiction of the State to levy such a tax, petitioners believe that important questions of federal constitutional law are presented which have not been, but should be, resolved by this Court. General and basic principles have been announced, but their applicability to the instant case appears to have been overlooked by the Courts below.

> This Court stated in *U.S. v. Bennett*, 232 U.S. 299 (1914):

> " . . . the power to tax was limited by the capacity of the taxing government to afford that *benefit and protection which is the true basis of the right to tax*, and which causes, therefore, taxation, where such capacity to confer benefit and afford protection does not exist, to be a mere arbitrary and unwarranted burden," 232 U.S. 307. (Emphasis added)

The Court has heretofore recognized the distinction between the right of the *federal* government to tax the income of a citizen resident abroad, even if derived from property located at his residence, *Cook v. Tait*, 265 U.S. 47 (1924), and the lack of power of a state to tax those to whom it affords no benefits or protection, *U.S. v. Bennett*, supra. The basis of the distinction is that the protection of the federal government follows the citizen wherever he goes, whereas the benefits of a state government accrue only to persons and property within its jurisdiction. As set forth in various decisions of this Court, jurisdiction to tax, in the case of residents, is said to be founded upon the rights and privileges incident to domicile; that is the *protection* afforded the recipient of income in his person, in his right to receive the income, and in his enjoyment of it when received, and in the case of non-residents, upon *dominion* over either the receiver of the income or the property or activity from which it is derived, and upon the obligation to contribute to the support of a government which renders secure the collection of such income. *Lawrence v. State Tax Comm.*, 286 U.S. 276 (1932); *Shaffer v. Carter*, 252 U.S. 37 (1920); *Travis v. Yale and Towne Mfg. Co.*, 252 U.S. 60 (1920); *James v. Drano Contracting Co.*, 302 U.S. 134 (1937) and others. There are limits, however. "The taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them", *Guaranty Trust Co. v. Vir-*

ginia, 305 U.S. 19, 23 (1938); *Alpha Portland Cement Co. v. Massachusetts,* 268 U.S. 203 (1925)

The Buck Act does not *confer* jurisdiction to tax to the states or create a basis for such where the same did not previously exist. All the Buck Act can be said to have done, at most, was to consent to the exercise of jurisdiction which was already in existence or inoperable solely because of cession of jurisdiction to the United States. The Buck Act does not say the states may now collect income tax from anyone and everyone, regardless of their connection with the State. It merely states individuals are not relieved from such tax liability levied by any State "having *jurisdiction* to levy such a tax." (Emphasis added). It should be noted here that the 1961 New Mexico acts included a provision for the deduction from "base income" of amounts which the State is "prohibited from taxing because of the provisions of the Federal Constitution," (72-15-6B, supra, page 6), but its officials continue to insist upon collection of the full rate from Petitioners in the instant cases.

The most important and basis issues created by the instant cases, in light of the principles previously announced by this Court arise out of the question: What does the White Sands worker who lives in El Paso, Texas, get for his New Mexico tax dollar? If the answer to this question is "nothing", then the tax must be held invalid. Petitioners submit that the record in this case fails to show *any* benefit conferred upon or protection afforded to them by the State of New Mexico. By reason of the fact that White Sands is a federal enclave, the State affords no police protection, security of employment, collection of salary or any other of the rights of citizenship of the State in such area, and although Petitioners pay the same rate of state income

tax as residents, they are deprived of the following benefits conferred upon residents of the State:

A. They cannot vote, *Arledge v. Mabry*, 197 P.2d 884 (1948), which held that even residents of federal areas could not vote. (New Mexico Legislative action has apparently changed this rule as to residents of the federal areas.)

B. They cannot send their children to educational institutions of higher learning in the State for free, or at rates equal to those of residents, N.M.S.A., 77-10-4.

C. They have no right to domiciliary legal action in the courts of New Mexico, including such actions as divorces, *Chaney v. Chaney*, 53 N.M. 66, 201 P.2d (1949) (as to residents of federal areas) but see *Grownover v. Grownover*, 58 N.M. 597, 274 P.2d 127 (1940) (after a legislative change) probate and guardianship proceedings, lunacy proceedings, adoptions, state habeas corpus actions and the like.

D. They cannot acquire hunting and fishing licenses at lower cost, N.M.S.A., 53-3-6.

E. They may not serve on juries.

3. The only possible benefit of which petitioners are aware is one which they are entitled to enjoy under the Constitution, free of any abridgment by the State, and which other non-residents may enjoy without taxation. The privileges and immunities of petitioners, as citizens of Texas under Section 2 of Article IV of the United States Constitution, include the right to "pass through, or reside in any . . State for purposes of trade . . professional pursuits, or otherwise", *U. S. v. Wheeler*, 254 U.S. 281 at 297 (1920), quoting Justice Washington on Circuit duty in *Corfield v. Coryell*, 6 Fed. Cas. 546, 500 (No. 3, 230) (C.C.E.D. Pa., 1823).

Citizens of many states use roads in New Mexico without paying it income tax. This Court has utilized Section 2 of Article IV of the Constitution to invalidate state taxes on several occasions, including *Toomer v. Witsell*, 334 U.S. 385 (1948), and *Ward v. Maryland*, 12 Wall. 418, 424 (1871).

This possible benefit is an access road, consisting of approximately six miles, from the White Sands Missile Range Reservation to the State line of Texas, over which Petitioners travel to and from their work at White Sands out of El Paso, Texas, where they reside. Whether it was built by the federal government or by New Mexico and by which sovereign maintained is not shown by the record. No other possible New Mexico facility is actually involved in their employment or receipt of income at White Sands Missile Range from the State of New Mexico.

4. Even if some minimum benefit is afforded petitioners, they assert that such is insufficient to afford the basis for the State of New Mexico to tax them at the full rate and in the same amount as residents who receive the full benefits of citizenship and domicile in the State of New Mexico. This Court has for many years invalidated state tax legislation against foreign corporations under the Due Process and Commerce Clauses when the tax was found to be in an unreasonable proportion to the amount of business in or benefits received from the states, *Hans Rees & Sons v. North Carolina*, 283 U.S. 123 (1931). As this Court said in *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves & Fittings, Inc.* 358 U.S. 450 (1959), this problem has become "tangled underbrush of past cases which have not always been clear . . . consistent or reconcilable." Nevertheless, the Court stated the basic principle to be that net income

of foreign corporations, "may be subjected to state taxation *provided* the levy is *not discriminatory* and is *properly apportioned* to local activities within the taxing state forming sufficient nexus to support the same." (Emphasis added) The issue now in such cases appears to be the *fairness* of the *apportionment* formula adopted by the State as to foreign corporations doing business in the State, *General Motors Corp. v. Washington*, 379 U.S. 436 (1964). Even though these multitude of cases center around state taxation of foreign corporations and the Commerce Clause, the individual should have at least equal if not greater rights to protection from this Court under the Due Process and Equal Protection Clauses of the 14th Amendment and from the Comity Clause in Section 2 of Article IV. The Court on at least one occasion has utilized the Privileges and Immunities Clause of the 14th Amendment to invalidate state taxes discriminatory against non-residents, *Colgate v. Harvey*, 296 U.S. 404 (1935). This case was overruled by *Madden v. Kentucky*, 309 U.S. 83, 93 (1940), but the Court has since used the Clause to invalidate state legislation, *Oyama v. California*, 322 U.S. 633, 640, 645 (1948). The principle of the *Colgate* case should be revived if necessary to invalidate the State law here which abridges the privilege of a citizen of Texas to work in a federal area in New Mexico without paying the latter a tax for which he receives nothing other than what the Constitution guarantees him, and which law abridges the immunity of a citizen of Texas from New Mexico income tax unless he receives something from the state sufficient to afford a reasonable basis of the tax. Certainly, New Mexico does not afford equal protection to Petitioners as it does to those who work or reside in the State outside federal areas. If this Court has come to the aid of non-resident corporations, which

were not even recognized as having the rights of citizens under the 14th Amendment, *Orient Insurance Co. v. Doggs*, 172 U.S. 557 at 561 (1899), the Court should come to the aid of these non-resident individual citizens who are victims of state income tax legislation which is just as arbitrary and unreasonable. Are corporations, which are not even "citizens" to receive better treatment, "better" due process and "more" equal protection than citizens? Even if there is some "nexus" here, which Petitioners refute, the amount of tax is clearly not apportioned to the benefits and protection afforded. Isn't the discrimination just as real and unfair where one pays the same tax and receives nothing as in the case where he pays a higher tax for the same protections? In the latter cases, the Court has acted many times to invalidate "discriminatory" taxation against non-residents, *Travis v. Yale & Towne Mfg. Co.* 252 U.S. 60 (1920); *Ward v. Maryland*, 12 Wall. 418, 424 (1871); *Chalker v. Birmingham & N. Ry. Co.*, 249 U.S. 522 (1919). It is not this Court's problem to determine for New Mexico what would be fair, or to draw an apportionment formula for them. The Court's duty is simply to invalidate what is unfair and disproportionate.

It is conceded that present counsel for Petitioners did not represent them until the New Mexico Supreme Court had decided the instant cases, and that the issues involving the Constitutional authority of New Mexico to tax non-residents by reason of their receiving no benefits or protection from the State, and other issues inherent therein, may not have been stressed below to such extent or in such a manner as to make the State aware of their importance to the case. Present Counsel do not know to what extent such questions were stressed below. In view of such circumstances, Peti-

tioners pray that if the State of New Mexico contends that it was not aware of such issues or that it has not had a sufficient opportunity to present all relevant facts in the courts below, that this Court remand these cases to the courts below in order to give the State an opportunity to present other relevant facts, if any, and to have such courts resolve such issues. Counsel believes that such issues have been raised (See Stipulation Appendix D, 1d); have been presented by the Petitioners' pleading (which assert invalidity of the taxes under Section 1 of the 14th Amendment and Section 2 of Article IV of the United States Constitution), their requested findings of facts and conclusions of law, all of which consistently questioned New Mexico's jurisdiction and authority to tax Petitioners, and by the reliance of Respondents and the Court in its opinion below on such cases as *Kiker v. Philadelphia*, 346 Pa. 624, 31A.2d 289 (1943), cert. denied 320 U.S. 741, in which the Pennsylvania Supreme Court dealt at some length with the benefits available in the federal area from the taxing authority as a justification for taxing employees residing in New Jersey. In any event, if the Respondents dispute their awareness of the presence below of the issues urged herein, Petitioners would ask for a remand to afford development of such additional facts, if any, which would give the courts the opportunity to pass on the issues with all of the relevant facts before them. Petitioners feel such remand would better serve the interests of justice rather than to have the Court deny certiorari in view of the importance of these cases to Petitioners, others employed at White Sands and the State of New Mexico, to all of whom these issues have been a constant source of litigation which is likely to continue until acted upon in a definitive manner by this Court. (Because of the discretionary nature of the

Writ hereby applied for, Petitioners acknowledge the existence of another alternative, which would be to grant the Writ, dispose of and define the basic areas of the law involved, and remand the case for further proceedings, as was done in *Paul v. U.S.*, 371 U.S. 245 (1963), and Petitioners pray that such additional alternative be considered and granted if deemed appropriate by the Court.)

CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honarble Court to review the judgment of the Supreme Court of New Mexico in Burns v. State, et al. (No.8453) and Hert v. State, et al. (No. 8454). In the alternative, Petitioners pray that this cause be remanded to the courts below if the Respondents dispute their awareness in the Courts below of the issues presented herein. In the event that the petition is granted, Petitioners pray that the judgments of the courts below be vacated if further proceedings are necessary and if not, that they be reversed, and that the courts below be directed to grant the relief prayed for in their petitions and to invalidate the New Mexico Income Tax law as to them.

Respectfully submitted,

JOSEPH A. CALAMIA
608 Southwest National Bank Bldg.
El Paso, Texas
Attorney for Petitioners

Of Counsel:
FRED J. MORTON
608 Southwest National Bank Bldg.
El Paso, Texas

CERTIFICATE OF SERVICE

I, JOSEPH A. CALAMIA, Attorney for Petitioners Raymond Burns and James B. Hert, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ..... 1968, I served true copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico, on the following parties, who are all the parties required to be served, and that they have been served in the following manner as provided by Rule 33, Paragraph 1 and Paragraph 3, Section b:

1. By depositing in a United States Mail Box, a copy of this Petition for a Writ of Certiorari in a properly and duly addressed envelope, Air Mail postage prepaid, to the Honorable Boston E. Witt, Attorney General of the State of New Mexico, State Capitol Building, Santa Fe, New Mexico.

JOSEPH A. CALAMIA

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

RAYMOND BURNS,
Plaintiff-Appellant,

vs. No. 8453

STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, VICENTE OJINAGA, ACTING DIRECTOR.
Defendants-Appellees.

CONSOLIDATED FOR PURPOSES OF APPEAL

JAMES B. HERT,
Plaintiff-Appellant,

vs. No. 8454

STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, HOWARD DOWNEY, ACTING DIRECTOR.
Defendants-Appellees.

OPINION

CARMODY, Justice.

Two separate actions were brought by residents of Texas, challenging the jurisdiction of the State to levy an income tax on wages paid to civilian personnel employed by the federal government at White Sands Missile Range in New Mexico. The trial court rendered judgment in favor of the State in both cases and, on

appeal, the cases were consolidated for the purpose of decision.

The appeal presents two questions: (1) Whether the State of New Mexico has taxing jurisdiction over the federal area involved, and (2) whether the state income tax law is in violation of the New Mexico constitution as exceeding constitutional limitations.

On February 12, 1941, the New Mexico legislature coded jurisdiction to the United States of the property here involved, reserving only the right to serve civil and criminal process (Ch. 8, 1941 Sess. Laws). Prior to the cession of jurisdiction, on October 9, 1940, the Congress passed what is termed as the "Buck Act" (4 U.S.C. §§ 104-110). Appellants argue that the Buck Act does not apply to them, because the legislature did not reserve taxing jurisdiction. The Buck Act provides:

> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.
>
> "(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940." (4 U.S.C. § 106)

Appellants attribute to the legislature an awareness of the Buck Act's effect, urging that the intentional cession of exclusive jurisdiction, except for service of process, was an express rejection of taxing jurisdiction.

Opposed to the appellants' position, appellees reason that the Buck Act had prospective effect and applies

equally to cessions made before and after its passage. In this connection, it is urged that for the New Mexico legislature to expressly reserve taxing jurisdiction would have been an idle gesture, because §110 (e) by its very definition gives states taxing jurisdiction in *all* federal areas, whether reserved or not.

> (e) The term 'Federal Area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State."

There is no question but that cession of jurisdiction to the United States deprives a state of jurisdiction in the absence of special federal legislation. Standard Oil Co. v. California (1934), 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775; International Business Machines Corporation v. Vaughn (Fla. 1957), 98 So.2d 747, Arlington Hotel Co. v. Fant, 1929, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447; Howard v. Commissioners, 1953, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617; Humble Pipe Line Co. v. Waggonner, 1964, 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed. 2d 782. However, when special legislation exists, as it does here, it appears to us that the opposite conclusion is inescapable. The question, therefore, becomes whether the Buck Act is self-executing, applicable in the instant case in spite of the fact that the cession took place after the passage of the federal act. Although there are no decisions of this court directly in point, at least two are persuasive and shed some light on the question.

In Arledge v. Mabry, 1948, 52 N.M. 303, 197 P.2d 884, the court was concerned with voter qualifications at Los Alamos, New Mexico. It was there held that because

of the vesting of exclusive jurisdiction in the federal government, Los Alamos was, in effect, not in New Mexico, and that therefore residents of Los Alamos did not come within the qualifications required of voters. In the course of the opinion, the effect of certain state taxes being levied against Los Alamos residents and its bearing on jurisdiction was considered. The opinion acknowledged the Buck Act as authorizing the levy of these taxes, although recognizing that only through a recession of jurisdiction could such power exist in the State. This portion of the opinion is particularly persuasive in light of the fact that the condemnation proceedings whereby the part of Los Alamos, with which the court was concerned, was acquired by the federal government in 1943 — this, of course, was subsequent to the passage of the Buck Act.

In McKee v. Bureau of Revenue, 1957, 63 N.M. 185, 315 P.2d 832, it was urged that the State lacked authority to collect certain use taxes in spite of the existence of the Buck Act, thereby again raising the question of the taxing power of the State. In that case, we impliedly accepted the State's contention that the Buck Act was self-executing, requiring affirmative act of acceptance. Accord, State v. Pearson Construction Co., 1957, 236 Ind. 602, 141 N.E.2d 448. Ordinarily, it is true that cession and/or recession of jurisdiction by one sovereignty to another requires an acceptance to render it effective. Yellowstone Park Transportation Co. v. Gallatin Co. (9th Cir. 1929), 31 F.2d 644, cert. denied 280 U.S. 555, 50 S.Ct. 15, 74 L.Ed. 611; Silas Mason Co. v. Tax Comm'n, 1937, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187; Kiker v. City of Philadelphia, 1943, 346 Pa. 624, 31 A.2d 289, cert. denied 320 U.S. 741, 64 S.Ct. 41, 88 L.Ed 439. Nevertheless, acceptance is presumed, absent the showing of a contrary intention, Silas Mason Co. v.

Tax Comm'n, supra; Kiker v. City of Philadelphia, supra. We certainly will not presume an intention on the part of the legislature to cede its taxing power in the absence of a clear showing to the contrary. See, McKee v. Bureau of Revenue, supra. In our view, the Buck Act must be accorded prospective operation; therefore, silence in the act ceding jurisdiction is not a clear indication of the intention to surrender the power to tax. It follows, therefore, that the State has jurisdiction to levy the tax in question against the appellants.

We now proceed to appellants' attack on the judgments on the constitutional basis. In essence, it is urged that the income tax levies a tax upon personal property within the meaning of art. VIII, § 2, of the New Mexico constitution and is in excess of the rates allowed therein. The section provides as follows:

> "Taxes levied upon real or personal property for state revenue shall not exceed four mills annually on each dollar of the assessed valuation thereof except for the support of the educational, penal and charitable institutions of the state, payment of the state debt and interest thereon; and the total annual tax levy upon such property for all state purposes exclusive of necessary levies for the state debt shall not exceed ten mills; Provided, however, that taxes levied upon real or personal tangible property for all purposes, except special levies on specific classes of property and except necessary levies for public debt, shall not exceed twenty mills annually on each dollar of the assessed valuation thereof, but laws may be passed authorizing additional taxes to be levied outside of such limitation when approved by at least a majority of the electors of the taxing district voting on such proposition."

The whole argument is whether or not income is property, in the sense above used. In this connection, there is no question but that the power to tax is in-

herent and may be exercised "without let or hindrance, except in so far as limited by the Constitution." See, Lujan v. Triangle Oil Co., 1934, 38 N.M. 543, 37 P.2d 797; and Asplund v. Alarid, 1923, 29 N.M. 129, 219 Pac. 786.

We have not before had occasion to directly consider the problem involved, although in State v. Gomez, 1929, 34 N.M. 250, 280 Pac. 251, we held that a succession or inheritance tax "is not a tax upon tangible property" and that its imposition did not violate art. VIII, § 1. Also, in Flynn, Welch & Yates v. State Tax Commission, 1934, 38 N.M. 131, 28 P.2d 889, we, in effect, held that a severance tax was something else than a property tax or a tax "upon tangible property." Also, in State v. State Tax Commission, 1936, 40 N.M. 299, 58 P.2d 1204, although admittedly dictum, it was pointed out that an income tax is not a tax on tangible property.

In other jurisdictions where the question of classification of income as property has been considered, it has been raised in cases where the graduated income tax, in its entirety, has been attacked as unconstitutional. The question posed in these cases was whether the graduated income tax was consistent with constitutional uniformity clauses. The results of the various opinions disclose a sharp split in authority of which the following are illustrative. Graduated income taxes have been held unconstitutional and income defined as property in the following cases: See e.g., Eliasberg Bros. Mercantile Co. v. Grimes, 1920, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300; Bachrach v. Nelson, 1932, 349 Ill. 579, 182 N.E. 909; Culliton v. Chase, 1933, 174 Wash. 363, 25 P.2d 81. In other jurisdictions, it has been determined that the uniformity clauses were inapplicable and that income was not property. See, e.g., Ludlow-

Saylor Wire Co. v. Wollbrinck, 1918, 275 Mo. 339, 205 S.W. 196; Featherstone v. Norman, 1930, 170 Ga. 370, 153 S.E. 58, 70 A.L.R. 449, Stanley v. Gates, 1929, 179 Ark. 886, 19 S.W.2d 1000; O'Connell v. State Board of Equalization, 1933, 95 Mont. 91, 25 P.2d 114; Diefendorf v. Gallet, 1932, 51 Idaho 619, 10 P.2d 307. Thus the above cases cannot be considered as directly in point with the issue before us, but they are instructive as to the nature of "income" as property.

The cases cited above from Montana and Idaho are particularly persuasive, because the uniformity clauses there involved are comparable to ours, even though we are not concerned with the uniformity clause per se. In Diefendorf, it was determined that an income tax was not a tax on property but rather an excise tax. We specifically acknowledge the fact that Idaho had an unusual constitutional provision, leaving the definition of "property" to statutory interpretation, but nevertheless the decision itself represents an excellent survey of the many decisions on the question and contains a well-reasoned conclusion. The Supreme Court of Montana, in O'Connell, also concluded that income was not property. The court did not determine whether it was an excise tax or not, but said "there are reasons why such a tax might be classed as a property tax, and reasons why it should be classed as an excise. Volumes, in fact libraries, have been written in a vain endeavor to accurately classify the income tax." The court concluded that the legislature intended to adopt an income tax and did not intend that it should be considered as a property tax. We likewise decline to state the exact nature of the tax, but take note of the fact that it has been referred to as a "nonproperty" tax. See, Newhouse, Constitutional Uniformity and Equality in State Taxation, particularly discussion commencing page

689. In this connection, the following quotation from Flynn, Welch & Yates v. State Tax Commission, supra, is pertinent:

> "It is not for the state to fit this tax into some existing and known mould of excise taxation, or fail; it is for appellee [appellants here] to demonstrate it to be a tax on tangible property, or fail."

Appellants strongly rely on Bachrach v. Nelson, supra, and Culliton v. Chase, supra, but we are unable to agree with the reasoning or the result of these decisions. In particular, appellants seem to derive considerable satisfaction from the statement from Culliton to the effect that the overwhelming weight of authority is in accordance with the Washington decision. We do not believe it is the overwhelming weight of the authority. See, Newhouse, supra, and Annots., 11 A.L.R. 313, 70 A.L.R. 468, 97 A.L.F. 1488. In any event, the cases really are not in point with respect to the problem before us. We would, however, note that the Washington constitution contains what that court termed a "peculiarly forceful constitutional definition," stating that property includes everything capable of ownership, whether real or personal property, and whether tangible or intangible. From this, Washington held that income was necessarily intangible property. If New Mexico had a similar provision, we would probably agree.

Viewing the constitution of New Mexico, particularly when we consider certain amendments thereto, leads us to the conclusion that income is not property in the constitutional sense as used in art.

VIII. Originally, art. VIII, § 1, read:

> "The rates of taxation shall be equal and uniform upon all subjects of taxation.

In 1914; this article was amended to read:

> "Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation in the same class."

It appears to us that the prior limitation on the power of the legislature to act was, by the amendment, relaxed to the extent that uniformity was required only upon subjects of taxation in the same class. It is important to note the phraseology used in the amendment with respect to "tangible property." To us, it is quite apparent that the utilization of the word "tangible" in § 1 was intentional, thereby distinguishing such property from "intangible property." Similarly, it should be noted that that portion of are. VIII, § 2, supra, containing the proviso, refers only to "real or personal tangible property." We would further take note of the fact that in November of 1967, the voters of New Mexico adopted a further amendment to art. VIII, § 2, and although the amendment has no bearing upon the issue before us, the language rfeerred to above was adopted without change.

In our opinion, the income tax in question is not levied real or personal property as these words are used in art. VIII, § 2, of the New Mexico constitution.

The judgments should be affirmed. IT IS SO ORDERED.

s/ David W. Carmody
Justice

WE CONCUR:

s/ David Chavez, Jr. C.J.
s/ M. E. Noble J.
s/ Irwin S. Moise J.
s/ J. C. Compton J.

APPENDIX B

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

NUMBER 35932

RAYMOND BURNS,

Plaintiff;

VS.

STATE OF NEW MEXICO,
BUREAU OF REVENUE,
INCOME TAX DIVISION,
VICENTE OJINAGA,
Acting Director.

Defendant.

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now RAYMOND BURNS, Hereinafter called Plaintiff, complaining of State of New Mexico, Bureau of Revenue, Income Tax Division, Vicente Ojinaga, Acting Director, hereinafter styled Defendant, and for grounds of complaint and cause of action, will respectfully show the Court:

1.

Plaintiff resides in El Paso County, Texas, and was a resident of El Paso County, Texas, at all times material hereto. During the year of 1964, Plaintiff was employed by the United States Government at White Sands Missile Range, Dona Ana and Otero Counties, New Mexico, a federal area under exclusive jurisdiction of the federal government. Plaintiff is so employed at this time, and brings this suit for himself individually and on behalf of all other persons who reside in El Paso County, Texas, and who resided in said county and state during 1964, and were employed by the United States government on said White Sands Missile Range, New Mexico.

2.

Plaintiff will show the Court that on April 17, 1964, the Secretary of The Treasury of The United States, purporting to act under the provisions of Section 84-B, U.S.C. as amended September 23, 1959, entered into agreement with the Bureau of Revenue of New Mexico and with the State of New Mexico, that beginning no later than May 31, 1964, income taxes claimed by New Mexico to be due to that state by non-residents of New Mexico because of their employment by the government of the United States at and on White Sands Missile Range, a federal area in said State of New Mexico, would be withheld from the pay due to such non-residents for each pay period.

3.

Purusant to the foregoing action of the Secretary of the Treasury the Department of the Army, on or about May 12, 1964, issued a directive to the effect that beginning no later than the pay period of May 31, 1964, New Mexico State income tax deductions would be withheld from paychecks of all civil service employees at White Sands Missile Range, including non-residents of New Mexico employed by the government at White Sands Missile Range.

4.

On May 13, 1964, the Commanding General at White Sands Missile Range, New Mexico, caused to be posted on all Bulletin Boards at White Sands Missile Range, the following:

White Sands Missile Range, New Mexico
12 May 1964

WSMR EMPLOYEES
TO PAY
NEW MEXICO STATE INCOME TAX

New Mexico State income tax deductions will be withheld from paychecks of all White Sands Mis-

sile Range civil service employees effective with the pay period starting on 31 May, 1964.

The new directive, received from Department of Army yesterday, specifies: "each employer in New Mexico will withhold New Mexico income tax from the compensation of employees of the United States who are subject to the tax and who are regularly employed in New Mexico, whether they are residents or non-residents."

The state tax is currently being deducted from the paychecks of WSMR workers who reside in New Mexico. Therefore this new ruling includes those employees *not* residing in New Mexico.

Rate of deduction will be approximately 7% of the dollar amount now being withheld for Federal income tax.

Military personnel will not be affected by this ruling.

FOR THE COMMANDER:

(Signed) M. E. Schulten
M. E. Schulten
Lt. Col. WAC;
For The Commander.

Distribution:
All Bulletin Boards
Remove after 30 June

5.

Plaintiff alleges that on each pay day at White Sands Missile Range, New Mexico, beginning May 31, 1964, and continuing to the date of filing of this petition, the United States government, acting through and by its officers, agents and employees at White Sands Missile Range, New Mexico, withheld from the earnings of Plaintiff and those on whose behalf this action is brought, certain sums of money alleged to be income tax due to the State of New Mexico by Plaintiff and those in whose behalf this action is brought; that during the months of July, 1964, October, 1964, and January, 1965, the agents, officers and employees of the

United States government at White Sands Missile Range, New Mexico, who had withheld such sums of money from Plaintiff's earnings and the earnings of those on whose behalf this action is brought, remitted the same to the Bureau of Revenue of the State of New Mexico, and said Bureau of Revenue, Income Tax Division, Vicente Ojinaga, Acting Director, in turn transmitted such money so withheld from the pay of Plaintiff and those on whose behalf this action is brought, to the State Treasury of the State of New Mexico.

6.

Plaintiff will show the Court that the United States government acting by its agents, officers and employees at White Sands Missile Range, New Mexico, will continue to withhold from the earnings of Plaintiff and those on whose behalf without constitutional and statutory for the following reasons, towit:

(a)

The Legislature of New Mexico had no constitutional authority to enact the graduated income tax law by which New Mexico collects and attempts to collect an income tax from Plaintiff and from those on whose behalf this action is brought, based on their earnings as employees of the federal government at White Sands Missile Range, New Mexico.

(b)

The State of New Mexico has no jurisdiction over the federal area in Dona Ana and Otero Counties, New Mexico, known as White Sands Missile Range, to levy and collect income taxes from persons employed by the federal government in that area.

(c)

The New Mexico Income Tax Act is administered in a way that discriminates against both resident and non resident civilian employees of the federal government

at White Sands Missile Range, in that military personnel working in that area side by side with civilian personnel, are not required to pay New Mexico Income taxes.

(d)

Two provisions of the New Mexico Income Tax Act, to-wit: Article 15, Sections 72-15-1 and Article 15, Sections 72-15-1.1, New Mexico Statutes annotated, 1953 Compilation, are so patently irreconciliable that both provisions are invalid and unenforceable, Section 72-15-1 providing that married persons who file federal income tax returns showing *a net income of $1,500.00 or less* shall not be assessed any income taxes while Section 72-15-1.1 declares it to be the purpose of this ACT (Sections 72-15-1 & 72-15-1.1) that married persons who have one or more dependents and who have net income of *LESS than $1,500.00* shall pay no income taxes. The two provisions are so conflicting and irreconciliable that the purpose of the Legislature cannot be determined.

(e)

The income tax form 151-A-IT, Non-Resident Income Tax Return, copy of which is attached hereto and made a part hereof, devised and prepared by the Bureau of Revenue of New Mexico, is so different from the Resident Income Tax Return form 101-IT, that non-residents required to file an income tax return to the State of New Mexico, are discriminated against in the following respects:

1.

Non-residents of New Mexico having income received from services performed or from business in New Mexico, are required to file their income tax returns on forms which require the disclosure of such persons' income from every source and for specific items listed

thereon, not only from New Mexico but from anywhere in the world, while residents of New Mexico are required to disclose nothing more on Form 101-IT, than their total taxable income as shown on Form 1040, U. S. Individual Income Tax Return; that there is no constitutional or statutory authority giving the Bureau of Revenue the power to devise and prepare such forms.

2.

Said Non-Resident Income Tax Form 151-A-IT is further discriminatory in that nowhere on said form is the non-resident who completes it, told that if he is a married person and filed a joint federal return showing a net taxable income of $1,500.00 or less he owes no state income tax, while the married resident of New Mexico who is presumed to know the law of his state, is advised at Line 10 of Resident Income Tax form 101-IT that if he is married and filed a federal income tax return showing a net taxable income of $1,500.00 or less he owes no income tax to New Mexico. Plaintiff alleges that this discrimination by the Bureau of Revenue is in violation of Section 2 of Article IV of the Constitution of the United States and of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

3.

Said income tax forms so devised and prepared by the Bureau of Revenue for both residents and non-residents cannot be completed in an intelligent manner and be correct for the reason that if the form shows a net taxable income of $1,500.00 in the case of a married person filing a federal income tax form 1040 such person will owe no state income tax under the provisions of Article 15, Section 72-15-1, New Mexico Income Tax Act, but under the provisions of Article 15, Section 72-15-1.1 he would owe income tax on $1,500.00 because

his return shows a taxable income which is NOT LESS than $1,500.00. If Plaintiff and those on whose behalf this suit is brought, be compelled to file income tax returns to the Bureau of Revenue on Non-Resident Income Tax forms so prepared by the Bureau of Revenue of New Mexico, and pay income taxes based on such return, they will be deprived of their property without due process of law in violation of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

(f)

The action of the Bureau of Revenue of New Mexico, in devising and preparing Schedule "A" Computation of Net Income, on Non-Resident Income Tax Return form 151-A-IT was arbitrary and without authority ol law; that said Bureau of Revenue devised said Schedule "A" so as to deprive non-residents of New Mexico having income from services performed in New Mexico or from business conducted in that state, of any deductions from their base income as that term is defined in Article 15, Section 72-15-6 New Mexico Statutes Annotated, 1953, Compilation, for 1964, or any years since June 29, 1961, so as to arrive at the true net taxable income for the year of 1964, and subsequent years, which action of the Bureau of Revenue is in violation of Section 1, of the Fourteenth Amendment of the Constitution of the United States and contrary to the provision of Section "B", subsections 1 and 4, of Article 15, Section 72-15-6 of New Mexico Statutes, 1953, Compilation.

WHEREFORE, premises considered, Plaintiff prays on behalf of himself and those on whose behalf this action is brought, that the Court in the exercise of its powers in equity, order the said Vicente Ojinaga, Acting Director of Income Tax Division, Bureau of Reve-

nue, State of New Mexico, to appear at such time and place as the Court may designate, to show cause, if any he may have why he should not be ordered to place in the Income Tax Suspense Fund, and leave there pending final judgment in this cause, all monies he may receive from the United States Government finance office at White Sands Missile Range, New Mexico, which monies will be deducted and withheld by said finance office from the earnings and pay due to the Plaintiff and those on whose behalf this action is brought, as alleged income taxes due or that may become due to the State of New Mexico, which monies will be forwarded to Bureau of Revenue, Income Tax Division, of the State of New Mexico by said Finance Office of the United States government, Department of The Army, White Sands Missile Range, New Mexico, at intervals of three months, April, July, October and January, while this cause is pending.

Plaintiff further prays that the said Vicente Ojinaga, Acting Director of the Income Tax Division, Bureau of Revenue, be cited to appear and answer herein and that upon final hearing hereon, Plaintiff, and those on whose behalf this action is brought, have judgment of the Court that: (a) The New Mexico Income Tax laws are unconstitutional and unenforceable; (b) New Mexice has no jurisdiction over the federal area in New Mexico known as White Sands Missile Range, to levy and collect an income tax from non-residents employed by the United States government in that area; (c) New Mexico discriminates against civilians employed by the government on said federal area in its failure to levy and assess an income tax against the earnings of military personnel performing services and being paid for such services within such federal area; (d) Sections 72-15-1 and 72-16-1.1 of Article 15, New Mexico Statutes

Annotated, 1953 Compilation, are void and of no effect because they conflict with each other and are irreconciliable; Income Tax form 151-A-IT devised and prepared by the Bureau of Revenue for use by non-residents of the State in filing their income tax returns to New Mexico, discriminates against such non-residents as are compelled to use such forms, and by so devising said non-resident income tax forms the State of New Mexico, acting by and through the Income Tax Division of Bureau of Revenue, attempts to deprive non-residents of New Mexico, who have income from services performed in or from business conducted in New Mexico, of their property without due process of law and in violation of Section 2, of Article IV of the Constitution of the United States and of Section 1, Fourteenth Amendment to the Constitution of the United States; theree is no statutory authority for the Bureau of Revenue to devise and prepare said forms; for judgment for the amount of money so remitted to the Bureau of Revenue by the Finance Office as income taxes withheld from Plaintiff and those on whose behalf this action is brought, from the date of the filing of this action until date of judgment and for an order requiring the Income Tax Division of Bureau of Revenue of New Mexico to pay to Plaintiff and those on whose behalf this action is brought, the amount of money so remitted to said Income Tax Division by said Finance Office of the United States government, Department of The Army, at White Sands Missile Range, New Mexico, and for such other orders as are just and proper.

Hubert T. Faulk
El Paso, Texas
Holvey Williams
El Paso, Texas
Julian Horwitz
El Paso, Texas
Thomas B. Rapkoch
Las Cruces, New Mexico
Attorneys for Plaintiff

(CAPTION OMITTED)

REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff hereby respectfully requests the court to make the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Findings of Fact (Nos. 1 through 11) requested by Defendants herein except that Howard Downing, instead of Vicente Ojinaga, is now the Acting Director of the Income Tax Division, Bureau of Revenue, State of New Mexico.

2. Beginning with the pay period of May 31, 1964 and continuing with each and every pay period since that time, the Finance Office of the Department of Army at White Sands Missile Range has not deducted and has not withheld from the pay due, military personnel any amount of money attributable to New Mexico income taxes imposed on such personnel and State of New Mexico acting through defendants has made no attempt to cause such finance office to make such deduction and withholding from the pay of such personnel.

Conclusions of Law

1. The New Mexico Legislature at all relevant times herein had no power or authority to enact a graduated income tax upon the income of plaintiff.

2. Section 72-15-6, N.M.S.A., 1953 Comp. is invalid and unconstitutional and does not provide a basis by which it is mathematically possible to determine either the federal income tax liability or the New Mexico income tax liability.

3. Section 72-15-51, N.M.S.A., 1953 Comp. is invalid and unconstitutional.

4. In enacting Section 72-15-51, *supra*, the Legis-

lature failed to establish sufficient definite standards to support its delegation of power to the Bureau of Revenue with respect to the administration of New Mexico income tax laws.

5. The exemption categories referred to in Section 72-15-51, *supra*, are not defined by reference to the Internal Revenue Code.

6. Exclusive jurisdiction over the White Sands Missile Range, except jurisdiction to serve civil and criminal process, was ceded by the State of New Mexico to the federal government before the State of New Mexico purported to levy any income tax on the income of plaintiff earned while employed at White Sands Missile Range.

7. The federal government has not ceded back to the State of New Mexico any part of the exclusive jurisdiction referred to in requested conclusion of law No. 6.

8. The State of New Mexico has no jurisdiction to tax the income of plaintiff earned while employed at White Sands Missile Range.

9. The State of New Mexico acting through defendants in the application, administration and enforcement of its income tax laws discriminating against plaintiff in favor of military personnel employed at White Sands Missile Range in violation of the 14th Amendment of the United States Constitution.

10. Plaintiff is not subject to New Mexico income tax on income earned at White Sands Missile Range.

11. Plaintiff is entitled to judgment against defendants for the amount of money withheld from plaintiff's income to date earned at White Sands Missile Range.

Respectfully submitted,
STEPHENSON, CAMPBELL & OLMSTED
By: James L. Holly, Jr.
Co-attorneys for Plaintiff

(CAPTION OMITTED)

JUDGMENT

This cause came on regularly for trial before the Court, and the issues having been duly tried, and the Court having made its findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED: that plaintiff's complaint herein be dismissed on its merits.

Dated, March 15, 1967.

SAMUEL Z. MONTOYA
District Judge

Approved:
EDWARD R. PEARSON
Assistant Attorney General

Attorney for Defendants
Approved as to form:
STEPHENSON, CAMPBELL & OLMSTED
By James B. Alley, Jr.
Co-attorneys for Plaintiff

APPENDIX C

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

JAMES B. HERT,

Plaintiff;

vs.

STATE OF NEW MEXICO,
BUREAU OF REVENUE,
VICENTE OJINAGA,
Acting Director,
INCOME TAX DIVISION;

Defendants.

NUMBER 26132

PLAINTIFF'S FIRST AMENDED

ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now JAMES B. HERT, Plaintiff in the above numbered and entitled cause, and with leave of the Court first had and obtained, files this, his First Amended Original Petition, complaining of STATE OF NEW MEXICO, BUREAU OF REVENUE, Income Tax Division of which VICENTE OJINAGA is Acting Director, hereinafter called Defendants, and for grounds of complaint and cause of action will respectfully show the Court:

1.

Plaintiff is a bona fide resident of El Paso County, Texas, and was such resident at all times material hereto.

2.

Plaintiff is employed and was employed during the months of January, February and March, 1965, by the federal government at White Sands Missile Range, a federal area in New Mexico.

3.

Plaintiff alleges that at the instance and request of the Defendants herein, and without lawful authority and without the consent of Plaintiff, the civilian Finance Office of the United States government at White Sands Missile Range, New Mexico, withheld from compensation due to Plaintiff for his services as an employee of said federal government during the months of January, February and March, 1965, the sum of $22.56, and thereafter, on or about April 15, 1965, said Finance Officer remitted said sum, without Plaintiff's consent, to the Bureau of Revenue, Income Tax Division, of the State of New Mexico, which said sum is now unlawfully withheld from the Plaintiff.

4.

Plaintiff alleges that on April 12, 1965, he filed with the Bureau of Revenue of New Mexico, Income Tax Division, Plaintiff's written protest of the payment of said sum of $22.56 or of any other amount alleged to be income taxes due to the State of New Mexico, and requested that said sum so unlawfully withheld from him and remitted to the Bureau of Revenue of New Mexico be held in the Income Tax Suspense Fund as provided by law, until Plaintiff's liability for said tax or any tax alleged to be due to New Mexico, has been judicially determined.

5.

Plaintiff says that he does not owe any amount of income taxes to the State of New Mexico for the months

of January, February and March, 1965, or for any other period of time; that the amount of $$22.56 withheld from compensation due to him by the federal government for his services as an employee of said federal government as hereinbefore set out, was unlawfully taken from him by an employee or agent of the federal government at White Sands Missile Range, New Mexico, at the instance and request of the Defendants herein, and said sum was unlawfully remitted by said Finance Office at White Sands Missile Range, New Mexico, to the Bureau of Revenue of New Mexico, Income Tax Division, and is being withheld unlawfully by said Bureau of Revenue, from Plaintiff, depriving him of his property and the use and enjoyment of same without due process of law and in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

6.

Plaintiff alleges and will show the Court that the acts of which he complains as being unlawful, are not lawful because:

(a)

Article 15, Section 72-15-1, New Mexico Statutes Annotated, 1963, compilation, which levies or purports to levy an income tax on a graduated scale as provided in Article 15, Section 72-15-21, New Mexico Statutes, 1953 Compilation, is unconstitutional in that the Constitution of the State of New Mexico does not give the Legislature of New Mexico power or authority to enact a graduated income tax law.

(b)

Section 72-15-6, Article 15, New Mexico Statutes Annotated, 1953, Compilation, is unconstitutional be-

cause it is vague, unintelligible, ambiguous, and renders mathematically impossible the filing of a correct income tax return to the State of New Mexico.

(c)

Section 72-15-51, New Mexico Statutes, 1953 Compilation, which purports to require employers to withhold certain amounts as income taxes due to New Mexico, from wages, salaries or compensation due to employees by employers, is unconstitutional because no income tax is due to the State of New Mexico until it has been levied and assessed and the law, Article 15, Section 72-15-21 provides that the tax shall be levied, collected and paid annually; that Plaintiff owes no income taxes because there has been no determination by an administrative agency of the State of New Mexico, based on an income tax return filed by the Plaintiff, that Plaintiff owes New Mexico any income taxes, and therefore, Defendants herein are withholding from Plaintiff his property, without due process of law in violation of Section 1, Fourteenth Amendment to the Constitution of the United States.

(d)

The State of New Mexico does not have jurisdiction over the federal area in New Mexico known as White Sands Missile Range, to levy and collect an income tax from Plaintiff.

WHEREFORE, Plaintiff prays that the Defendants be cited to appear and answer herein and that upon final hearing Plaintiff have judgment ordering the Defendants to return said sum of $22.56, together with

interest thereon, to Plaintiff, together with Plaintiff's costs in his behalf expended in this cause.

Hubert T. Faulk
325 W. Missouri Ave.
El Paso, Texas.

Thomas B. Rapkoch
Las Cruces, New Mexico

Counsel For Plaintiff

(CAPTION OMITTED)

REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Plaintiff) Defendant hereby respectfully requests the court to make the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Findings of Fact (Nos. 1 through 13) requested by defendants herein.

Conclusions of Law

1. The New Mexico Legislature at all relevant times herein had no power or authority to enact a graduated income tax upon the income of plaintiff.

2. Section 72-15-6, N.M.S.A., 1953 Comp. is invalid and unconstitutional and does not provide a basis by which it is mathematically possible to determine either the federal income tax liability or the New Mexico income tax liability.

3. Section 72-15-51, N.M.S.A., 1953 Comp. is invalid and unconstitutional.

4. In enacting Section 72-15-51, *supra*, the Legislature failed to establish sufficient definite standards to

support its delegation of power to the Bureau of Revenue with respect to the administration of New Mexico income tax laws.

5. The exemption categories referred to in Section 72-15-51, *supra,* are not defined by reference to the Internal Revenue Code.

6. Exclusive jurisdiction over White Sands Missile Range, except jurisdiction to serve civil and criminal process, was ceded by the State of New Mexico to the federal government before the State of New Mexico purported to levy any income tax on the income of plaintiff earned while employed at White Sands Missile Range in the years 1961 through 1965.

7. The federal government has not ceded back to the State of New Mexico any part of the exclusive jurisdiction referred to in requested conclusion of law No. 6.

8. The State of New Mexico has no jurisdiction to tax the income of plaintiff earned while employed at White Sands Missile Range in the years 1961 through 1965.

9. Plaintiff is not subject to New Mexico income tax on income earned at White Sands Missile Range during the years 1961 through 1965.

10. Plaintiff is entitled to judgment against defendants in the amount of $22.56.

Respectfully submitted,

STEPHENSON, CAMPBELL & OLMSTED
By James B. Alley, Jr.
Co-attorneys for Plaintiff

(CAPTION OMITTED)

JUDGMENT

This cause came on regularly for trial before the Court, and the issues having been duly tried, and the Court having made its findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED: that plaintiff's complaint herein be dismissed on its merits, and it is further

ORDERED, ADJUDGED AND DECREED:

1. That defendant, State of New Mexico, have judgment against plaintiff on its counterclaim;

2. That plaintiff file income tax returns with the State of New Mexico for the years 1961, 1962, 1963 and 1964:

3. That plaintiff pay his income tax liability to the State of New Mexico for the years 1961, 1962, 1963 and 1964 in the sum of $344.56, plus penalty in the sum of $34.46, plus interest thereon at the rate of one-half percent per month until paid.

Dated, March 15, 1967.

SAMUEL Z. MONTOYA
District Judge

Approved:
EDWARD R. PEARSON
Assistant Attorney General

Attorney for Defendants
Approved as to form:
STEPHENSON, CAMPBELL & OLMSTED
by James B. Alley, Jr.
Co-attorneys for Plaintiff

APPENDIX D

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

RAYMOND BURNS,

Plaintiff-Appellant,

VS.

No. 8453

STATE OF NEW MEXICO
BUREAU OF REVENUE
INCOME TAX DIVISION
VICENTE OJINAGA,
Acting Director,

Defendant-Appellees,

JAMES B. HERT,

Plantiff-Appellant,

VS.

No. 8454

STATE OF NEW MEXICO
BUREAU OF REVENUE
VICENTE OJINAGA,
Acting Director;
INCOME TAX DIVISION

Defendant-Appellee

STIPULATION

IT IS HEREBY STIPULATED between the undersigned that the above-captioned appeals, both having stipulated facts which are substantially similar and both raising only questions of law concerning the power and authority of the State of New Mexico to levy an income

tax upon nonmilitary personnel employed by the federal government at White Sands Missile Range but residing in the State of Texas, may be, with the consent of the Court, consolidated for the purposes of appeal so that only one set of briefs and one oral argument is necessary for both appeals.

Dated: July 5, 1967

STEPHENSON, CAMPBELL & OLMSTED

by James B. Alley, Jr.
Attorneys for Both Appellants

ATTORNEY GENERAL OF THE STATE OF NEW MEXICO

by Edward R. Pearson
Attorney for both Appellees

Supreme Court, U.S.
FILED
AUG 5 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 268

RAYMOND BURNS, *Petitioner,*

v.

THE STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, VICENTE OJINAGA, Acting Director, *Respondents,*

AND

JAMES B. HERT, *Petitioner,*

v.

THE STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, HOWARD DOWNING, Acting Director, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 268

RAYMOND BURNS, *Petitioner,*

v.

THE STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, VICENTE OJINAGA, Acting Director, *Respondents,*

AND

JAMES B. HERT, *Petitioner,*

v.

THE STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, HOWARD DOWNING, Acting Director, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico is reported at 439 P. 2d 702.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. United States Constitution

ARTICLE I, SECTION 8, CLAUSE 17:

> To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;

ARTICLE IV, SECTION 2, CLAUSE 1:

> The Citizen of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

AMENDMENT XIV, SECTION 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Federal Statutes

BUCK ACT, 4 U.S.C. § 106 (1940) (Vol. 1 at 106):

> (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his

residing within a Federal area or receiving income from transactions occurring or services performed in such area; and *such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.* (Emphasis added)

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

BUCK ACT, 4 U.S.C. § 110(e) (1940) (Vol. 1 at 107):

As used in sections 105-109 of this title:

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

C. New Mexico Statutes

Section 72-15-1, N.M.S.A., 1953 Compilation (1963), N.M. Laws 1963, ch. 323, § 2 (Vol. 10, pt. 2, 1963 Supp. at 40-41):

A. There is assessed and levied a tax for the use of the state general fund and the state government, at the rates specified in sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation upon the net income of every:

(1) resident individual, trust, fiduciary or estate of the state;

(2) domestic corporation or association, and of every nonresident individual, trust, fiduciary, or estate having a business, agency or employment, or

engaged in the transaction of business in, into or from this state, or deriving any income from any property or employment within this state, in proportion to the net income of the business, agency or employment as hereinafter provided.

B. No state income tax shall be assessed and levied for the year 1963 or any subsequent year upon:

(1) any married taxpayer filing a joint federal income tax return whose net income, as that term is defined in section 72-15-6 New Mexico Statutes Annotated, 1953 Compilation, is fifteen hundred dollars ($1500) or less, or

(2) any individual taxpayer who has one [1] or more dependents and whose net income, as that term is defined in section 72-15-6 New Mexico Statutes Annotated, 1953 Compilation, is fifteen hundred dollars ($1500) or less.

Section 72-15-1.1, N.M.S.A., 1953 Compilation (1957) (Vol. 10, pt. 2 at 283):

No person shall be relieved from liability for any income tax levied by this state, or by any duly authorized taxing authority herein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or work or services performed in such area, with such taxes applying in federal areas to the extent permitted by Acts of Congress.

Section 72-15-3 (p), N.M.S.A., 1953 Compilation (1933) (Vol. 10, pt. 2 at 285):

For the purpose of this act [72-15-1 to 72-15-48], and unless otherwise required by the context:

* * *

(p) "Business" includes trade, profession, occupation or employment.

Section 72-15-6A and B, N.M.S.A., 1953 Compilation (1961) (Vol. 10 pt. 2 at 286):

A. "Base income" of a taxpayer means that part of the taxpayer's income generally defined as federal taxable income and upon which the federal income tax is calculated less the federal income tax payable for the taxable year.

B. The "net income" of all taxpayers shall be the "base income" adjusted to provide that:

(1) Amounts that have been taxed as income in a previous year by the state shall not be taxed again;

(2) Amounts, including net operating losses, that have been deducted in a prior year's computation of state income tax liability shall not be deducted again;

(3) Amounts included in base income that the state is prohibited from taxing because of the provisions of the federal Constitution, the state Constitution or federal laws shall be deducted; and

(4) The full amount of the federal capital gains deductions for the taxable year shall be added to the base income if not included in that figure and shall be subject to state income tax.

Section 72-15-21A and E, N.M.S.A., 1953 Compilation (1961) (Vol. 10 pt. 2, at 290-291):

A. The tax assessed by sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation is imposed at the following rates upon every resident and nonresident individual of this state, and the tax shall be levied, collected and paid annually upon his net income taxable in this state:

(1) One and one-half per cent [1½%] [1% after December 31, 1963] on net income up to and including ten thousand dollars ($10,000);

(2) Three per cent [3%] [2% after December 31, 1963] on that net income in excess of ten thousand dollars ($10,000) and not exceeding twenty thousand dollars ($20,000);

(3) Four and one-half per cent [4½%] [3% after December 31, 1963] on all net income in excess of twenty thousand dollars ($20,000) and not exceeding one hundred thousand dollars ($100,000);

(4) Six per cent [6%] [4% after December 31, 1963] on all net income in excess of one hundred thousand dollars ($100,000).

* * *

E. The tax assessed by the provisions of sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation is imposed at the same rates upon the net income of nonresident individuals of this state in so far as and to the extent that the net income was derived from property owned or business, trade, profession or occupation carried on in this state by those individuals.

Section 72-15-22, N.M.S.A., 1953 Compilation (1961) (Vol. 10 pt. 2 at 292):

In the case of a nonresident individual transacting business both within and without this state the tax imposed shall be upon the portion of his entire net income for each taxable year as is derived from sales, wherever made, of products, goods, wares and merchandise, manufactured, or which originated, in this state, and from other business done or property located within this state, which may be determined by an allocation and separate accounting when books of the individual show income derived from business done and property located within this state; otherwise the income tax imposed by section 72-15-21 New Mexico Statutes Annotated, 1953 Compilation shall be on the pro-

portion of the entire net income of the individual equal to the ratio of his gross receipts in this state during the taxable year to his total gross receipts on business transaction both within and without the state during that year.

Section 7-2-7, N.M.S.A., 1953 Compilation (1941) (Vol. 2 at 322):

> Exclusive jurisdiction is hereby ceded to the United States over all the territory set apart from the public domain and comprised within the limits of the Fort Wingate Military Reservation, in McKinley County, and Fort Bliss Target Range, in Dona Ana County, and over such land as may hereafter be reserved from the public domain for the enlargement of said reservations; Provided, however, that the state of New Mexico reserves the right to serve civil or criminal process within said reservations in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of such cession and reservations; and Provided further, that the jurisdiction herein ceded shall continue no longer than the United States shall own and hold said reservations for military purposes.

STATEMENT OF THE CASE

In 1964, the Secretary of the Treasury of the United States consented to the withholding of New Mexico income tax from petitioners' earnings. The Department of the Army, by order of the Commanding General at White Sands Missile Range, began withholding the tax from petitioners' earnings and remitting it to the State of New Mexico. (Hert 22-23; Burns 12-13)

Petitioners brought separate actions in the District Court of Santa Fe County, New Mexico to recover the amounts withheld from their earnings, alleging gener-

ally that the New Mexico income tax law was unconstitutional. (Hert 11-12; Burns 4-5) Petitioner Hert also alleged that because he had not filed an income tax return, respondents could not determine that he owed any income tax and that therefore, withholding from his earnings deprived him of his property without due process of law. (Hert 12) Petitioner Burns also alleged that the non-resident income tax returns devised by respondents deprived him of due process of law and unlawfully discriminated against him. (Burns 6-7)

The New Mexico Supreme Court held that under the Buck Act, New Mexico has jurisdiction to impose its income tax upon income earned by persons at the White Sands Missile Range.

ARGUMENT

1. The major premise of petitioners' argument apparently is that only those state laws existing at the time of the cession to the United States of exclusive jurisdiction over the White Sands Missile Range apply within the federal enclave. Petitioners claim that the Buck Act is merely a codification of this rule and that because Section 72-15-1, N.M.S.A., 1953 Compilation was enacted subsequent to the cession of jurisdiction, does not apply to persons earning income within the White Sands Missile Range.

Petitioners rely on the rule quoted in *Paul* v. *United States,* 371 U.S. 245, 268 (1963). The reason for this rule is that federal enclaves must be left with a developed legal system for *private rights. James Stewart & Co.* v. *Sadrakula,* 309 U.S. 94, 100 (1940). The rule does not allow the states to levy taxes within federal enclaves even if the tax laws were in existence at the

time jurisdiction over the enclaves was ceded to the United States. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934); *General Supply Co.* v. *Cook*, 281 U.S. 647 (1930). Under Article I, § 8, cl. 17 of the United States Constitution, Congress may modify the application of both rules.

Congress has the power to apply to federal enclaves state laws enacted subsequent to the cession of jurisdiction over the enclaves, *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *Murray* v. *Joe Gerrick & Co.*, 291 U.S. 315 (1934), the power to grant to local legislative bodies the right to exercise jurisdiction over federal enclaves, *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U.S. 100 (1953) and the power to grant the States permission to levy taxes within federal enclaves, *Offutt Housing Co.* v. *County of Sarpy*, 351 U.S. 253 (1956); *Howard* v. *Commissioners*, 344 U.S. 624 (1953), including taxes levied under tax laws enacted subsequent to the grant of permission, *Superior Bath House Co.* v. *McCarroll*, 312 U.S. 176 (1941). Under the Buck Act, Congress has exercised its constitutional power and has granted the States permission to levy certain taxes within federal enclaves. *Humble Pipe Line Co.* v. *Waggoner*, 376 U.S. 369, 374 (1964); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 383 (1964); *Offutt Housing Co.* v. *County of Sarpy*, *supra* at 256-257; *Howard* v. *Commissioners*, *supra* at 627.

In *Howard* v. *Commissioners*, *supra*, the United States acquired land in Kentucky, upon which a Naval Ordnance Plant was located, by condemnation proceedings filed in 1940. In 1941, the Secretary of the Navy,

on behalf of the United States, accepted exclusive jurisdiction over the area and the Governor of Kentucky acknowledged this acceptance. The United States did not acquire exclusive jurisdiction over the area until it was accepted in 1941. 40 U.S.C., § 255 (1940). In 1947 and 1950, the City of Louisville annexed certain territory, including the Ordnance Plant and began collecting a license tax from persons employed at the Ordnance Plant. The ordinance imposing the tax was enacted in 1950. The facts of *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville, supra,* are identical with those of the instant case.

Employees of the Ordnance Plant brought an action for a declaratory judgment that the Ordnance Plant was not within the City of Louisville and that they were not subject to the tax levied by the City. This Court held at 344 U.S. 626-627 that the property did not cease to be a part of Kentucky when it was acquired by the United States and became a part of the City of Louisville by annexation and that the right to tax income paid to employees who worked at the Ordnance Plant was granted the City of Louisville by the Buck Act. At 344 U.S. 629, this Court said that "By virtue of the Buck Act, the tax can be levied and collected within the federal area, just as if it were not a federal area."

The language of 4 U.S.C. §§ 106 and 110 clearly indicates that Congress intended to grant the States permission to impose income taxes on persons earning income within federal enclaves even if jurisdiction over the enclaves was ceded after enactment of the Buck Act and even if the tax laws are enacted subsequent to enactment of the Buck Act. Under 4 U.S.C. § 106, the States are given "full jurisdiction and power to levy

and collect . . . [any income] tax in any Federal area within . . . [the] States to the same extent and with the same effect as though . . . [the] area was not a Federal area." The grant of permission to tax is not restricted to income tax laws enacted prior to the enactment of the Buck Act but applies to "*any* income tax". 4 U.S.C. § 106. Moreover, the grant is not restricted to federal areas that were ceded to the United States before the enactment of the Buck Act but applies to "*any* Federal area". 4 U.S.C. §§ 106 and 110. Thus, for income tax purposes, all federal areas are treated as if they are the same as any other part of the State.

If the interpretation of the Buck Act advocated by petitioners were adopted, some States would have jurisdiction to levy taxes in federal enclaves while other States would not have such jurisdiction. This interpretation defeats the intent of Congress as expressed by the unrestricted language of the Buck Act.

In *Arlidge* v. *Mabry,* 52 N.M. 303, 197 P. 2d 884 (1948), the Court held only that residents of Los Alamos did not qualify as voters under the New Mexico Constitution.

The Supreme Court of New Mexico held that even though exclusive jurisdiction over the White Sands Missile Range was ceded after the enactment of the Buck Act, New Mexico must be presumed to have accepted the permission to tax that was granted in the Buck Act. *Silas Mason Co.* v. *Tax Commission,* 302 U.S. 186 (1937). If acceptance of permission to tax is necessary, New Mexico showed its acceptance in Section 72-15-1., N.M.S.A. 1953 Compilation and by levying its income tax on incomes earned within the White

Sands Missile Range. *S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558, 564 (1946).

2. The issues that petitioners raise concerning the constitutional authority of New Mexico to tax nonresidents were never raised in the Court below or decided by those Courts.

There is no doubt that petitioners questioned the jurisdiction and authority of New Mexico to levy its income tax on petitioners, but the records in these cases are devoid of any suggestion that the grounds now raised were raised in the Courts below. Petitioners claimed that the New Mexico income tax laws were unconstitutional. (Hert 11-12; Burns 4-7). Without more, such a claim will be taken as intended to apply to the New Mexico Constitution, not to the United States Constitution. *Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry. Co.,* 228 U.S. 326 (1913). Petitioners also claimed that the New Mexico income tax laws violated Article IV, § 2 and Amend. XIV, § 1 of the United States Constitution. (Hert 12; Burns 6-7) Petitioners did not preserve their claims under these Federal constitutional provisions, with the exception of the claim that New Mexico discriminated in favor of military personnel in violation of Amend. XIV, in their Requested Conclusions of Law in the District Court below. (Hert 33-34; Burns 19-20) Petitioners' claim that the New Mexico income tax law violated these Federal constitutional provisions did not specify that the ground for such a claim was that New Mexico does not have the constitutional authority to tax nonresidents. The issues now raised were not properly presented and preserved for review. *New York ex rel. Cohn* v. *Graves,* 300 U.S. 308 (1937); *Mellon* v. *O'Neil,* 275 U.S. 212

(1927); *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648 (1897).

Under New Mexico practice, a constitutional issue that is not raised in the trial court cannot be raised on appeal in the New Mexico Supreme Court. *Johnson* v. *Sanchez,* 67 N.M. 41, 351 P. 2d 449 (1960); *In Re Reilly's Estate,* 63 N.M. 352, 319 P. 2d 1069 (1957). Petitioners' failure to raise the issues concerning New Mexico's constitutional authority to levy its income tax on nonresidents in the trial court below is an adequate state ground for the decision of the New Mexico Supreme Court. *Edelman* v. *California,* 344 U.S. 357 (1953).

3. In *Shaffer* v. *Carter,* 252 U.S. 37 (1920) and in *Travis* v. *Yale & Towne Manufacturing Co.,* 252 U.S. 60 (1920), this Court held that the States may constitutionally tax the income nonresidents derive from engaging in occupations within their borders. In *Shaffer* v. *Carter, supra,* this Court said at 52-53 that:

> And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein; * * *
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> That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of non-residents may not be required to make a

> ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State. Section 2 of Art. IV of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with the resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption.

The New Mexico income tax is levied only upon that part of petitioners' income as is derived from their occupations carried on in New Mexico. Sections 72-15-1, 72-15-21E and 72-15-22, N.M.S.A., 1953 Compilation. The New Mexico income tax is not levied upon income derived from sources located outside New Mexico. Petitioners are subject to the same rate of taxation as are residents of New Mexico, Section 72-15-21, N.M.S.A., 1953 Compilation, they are entitled to the same exemptions as are residents, Section 72-15-1, *supra* and they are entitled to take the same deductions as are residents, Section 72-15-6, N.M.S.A., 1953 Compilation. Because petitioners are accorded the same treatment as are residents of New Mexico, the imposition of the tax upon that part of their income derived from sources in New Mexico does not deny them the privileges and immunities of citizens of New Mexico or the equal protection of the laws. Petitioners are not entitled to greater privileges and immunities.

New Mexico gave petitioners the opportunity to engage in their occupations in the State. The business productivity generated by New Mexico affords petitioners the benefits of employment in the State. New Mexico laws afford petitioners an organized and orderly society within which to engage in their occupations and afford property, business and industry the protection and security without which gainful occupation would be impossible. In the instant case, petitioners have used the Courts of New Mexico to protect their property rights. New Mexico has afforded petitioners benefits and protection in return for which it levies its taxes, consistently with due process. Respondents submit that a remand of these cases would serve no useful purpose.

CONCLUSION

By reason of the foregoing respondents respectfully submit that petitioners have failed to present Federal questions of substance and that the Writ should be denied.

Respectfully submitted,

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